

Senator Ted Ferrioli
Senate District 30

Representative Mike McLane
House District 55



October 21, 2016

Ms. Paloma Sparks
Legislative Director
Oregon Bureau of Labor and Industries
800 NE Oregon St. #1045
Portland, OR 97232

Re: Legislative Intent for Paid Sick Leave Rules on Piece-Rate Work and Employee Count

Dear Ms. Sparks,

Thank you for the opportunity to discuss modifications to the proposed paid sick leave rules to make them more consistent with the plain text of the law and legislative intent. It is critical to do everything possible to assist Oregon's small businesses and family farmers, especially in rural areas. Staying true to the expectations created by legislative intent is the best way to promote a thriving economy that benefits businesses and workers alike.

Under Oregon law, a state agency may not issue a rule that exceeds the statutory authority of the agency, such as by departing from a statutory policy directive. *Planned Parenthood Assn. v. Dept. of Human Res.*, 297 Or. 562, 572-74 (1984). For paid sick leave, ORS 653.656(2) only gives BOLI the authority to "adopt rules necessary for the implementation and enforcement," not to reverse policy decisions made by the legislature. BOLI's proposed rules should be modified because they exceed statutory authority, both by the new piece-rate work formula and by including family members in the employee count for most small businesses.

Piece-Rate Modifications

While the current version of the piece-rate work rule is consistent with both the plain text of Oregon's paid sick leave law and the unambiguous legislative intent, BOLI's proposed changes are deeply flawed. BOLI's proposed OAR 839-007-0000(8)(d) says that piece-rate workers should receive a rate of pay for sick time that equals the employee's total earnings for the pay period during which the employee used sick time divided by the number of hours worked by the employee in the pay period. Thus, an employee who earns \$750 over 40 hours would receive \$18.75 per hour for sick time. This formula, therefore, directly conflicts with the plain text and legislative intent of the law.

Under ORS 653.606(5)(c)(B), an employee doing piece-rate work must be paid for sick time “at the employee’s regular rate of pay” or if they do not have a “previously established regular rate of pay, the employer shall pay the employee at a rate equal to at least the minimum wage.” Thus, the plain text makes clear that a worker receiving a piece-rate work incentive while picking a crop would receive a rate for paid sick leave that is equal to the worker’s rate of pay when they are not picking a crop, or at the minimum wage if they had no prior non-crop-picking work. Unfortunately, the contortionist logic of BOLI’s proposed rule does not account for year-round workers who only occasionally pick crops with a piece-rate work incentive, which undermines the need for stable employment.

To the extent that there is any ambiguity in the text of the law, the legislative intent is instructive. *See State v. Gaines*, 346 Or. 160 (2009). Senator Michael Dembrow, during his floor speech as the Senate carrier of the paid sick leave bill, reiterated the unambiguous legislative intent that workers who receive a piece-rate for their work should be paid at a rate of pay different than their piece-rate work incentive for sick leave hours. While dismissing concerns that sick leave might be inaccurate for piece-rate workers, he said:

We heard a lot of concern that seasonal workers, who are badly needed during harvest time, will prefer to stay home and get paid their sick leave. Well, nearly all these workers are being paid at *a piece-rate that is much higher than the minimum wage that they would receive when sick*. They are not gonna want to take the financial hit that staying home will create.¹ (emphasis added)

Senator Dembrow’s floor speech was consistent with the summary of the final amendment that he distributed in committee, in which he wrote that “For piece-rate workers, compensation is at their ‘regular’ wage (i.e., wage when they do non-piece-rate work, at least minimum wage.) *Section 3(5)(c)(B)*.”²

Representative Paul Holvey, during his floor speech as the House co-carrier of the paid sick leave bill, echoed the unambiguous intent. He stated:

We recognized that *piece-rate workers don’t necessarily have a regular rate of pay*, but all employers are required to track the number of hours employees work, including agriculture. And the law currently states that piece-rate workers have to make at least the minimum wage to follow the law, so they know how many hours they’re working. So they, *if they, just work piece-rate, under this bill, and they go to take paid sick time*, if they’re eligible for it, and I do say if, *they get paid at the minimum wage rate*. That’s under this bill, which is a lot less money than

¹ Senate Floor Debate on Senate Bill 454-B, Senator Michael Dembrow Floor Speech (June 10, 2015) at 1:30:50 to 1:31:15, http://oregon.granicus.com/MediaPlayer.php?clip_id=9969

² Joint Subcommittee on Human Services, Senator Michael Dembrow, *Senate Bill 454-A39 Dembrow Testimony* (June 1, 2015), <https://olis.leg.state.or.us/liz/2015R1/Downloads/CommitteeMeetingDocument/76567>; *See also* Senate Committee on Workforce, Senator Michael Dembrow, *Sen. Michael Dembrow Infopacket: Effect of -3* (March 23, 2015), <https://olis.leg.state.or.us/liz/2015R1/Downloads/CommitteeMeetingDocument/55398>

what they make at piece-rate, as the representative from East and Central Salem talked about. Those workers aren't gonna want to stay home sick. They can't afford to. But when they are sick and they have to stay home, they can and at least get the minimum wage. They are gonna want to be at work and make that piece-rate work.³ (emphasis added)

BOLI's proposed rule on piece-rate work is inconsistent with both the plain text of the law and the unambiguous legislative intent. By ignoring the legislative intent, the proposed BOLI rule undoes a key section of the bill that Senator Dembrow and Representative Holvey recognized during floor speeches and in committee as having been changed as a concession to help small family farms. Instead, BOLI should stick with the current rule, which appropriately implements the law.

Employee Count Modifications

BOLI's proposed change to the employee count requirement in OAR 830-007-0000 has no legal basis and will harm small businesses across Oregon by burdening them with costly record-keeping requirements and forcing them to cut workers. Under ORS 653.601(1)(c)(F), the definition of "employee" does not include "[a]n individual employed by that individual's parent, spouse or child." The text of this family-member exclusion contains no distinctions or qualifications based on how a business is legally organized. Representative Paul Holvey, during his floor speech as the House co-carrier of the paid sick leave bill, stated: "If a family member is working for another family member, are they covered under this bill? And that, they are not. That's explicit in the bill. There is no confusion about that."⁴

Similarly, during the subcommittee work session that adopted the final version of the bill, the dialogue between subcommittee members and advocates of the bill confirmed that family members were not intended to be included in employee counts, and no distinction was made regarding business entity type.⁵ Further, Senator Dembrow's summary of the final amendment distributed in committee says that the definition of employee "Excludes family members, independent contractors, and interns. *Section 2(1)(c)*"⁶

Unfortunately, BOLI's Proposed OAR 839-007-0000(2)(b)(F) adds a new qualification that family members are only excluded from the employee count if they are "employed by a sole proprietorship in which the sole proprietor is the individual's parent, spouse or child." The proposed rule's discrimination against many small businesses based on their legal organization status is

³ House Floor Debate on Senate Bill 454-B, Representative Paul Holvey Closing Floor Speech (June 12, 2015) at 4:10:19 to 4:11:36, http://oregon.granicus.com/MediaPlayer.php?clip_id=9990

⁴ House Floor Debate on Senate Bill 454-B, Representative Paul Holvey Closing Floor Speech (June 12, 2015) at 4:13:58 to 4:14:10, http://oregon.granicus.com/MediaPlayer.php?clip_id=9990

⁵ Joint Subcommittee on Human Services, Committee Discussion between Representatives Duane Stark, Paul Holvey, Andy Olson, and Senator Michael Dembrow at 24:33 to 26:26 (June 1, 2015), http://oregon.granicus.com/MediaPlayer.php?clip_id=9852

⁶ Joint Subcommittee on Human Services, Senator Michael Dembrow, *Senate Bill 454-A39 Dembrow Testimony* (June 1, 2015), <https://olis.leg.state.or.us/liz/2015R1/Downloads/CommitteeMeetingDocument/76567>; See also Senate Committee on Workforce, Senator Michael Dembrow, *Sen. Michael Dembrow Infopacket: Effect of -3* (March 23, 2015), <https://olis.leg.state.or.us/liz/2015R1/Downloads/CommitteeMeetingDocument/55398>

inconsistent with the reality of family businesses and legally baseless. Once again, BOLI appears to be stretching the language of Oregon statutes to the breaking point in order to achieve policy goals opposite of the legislative intent. The legislature purposefully exempted family members from the employee count in Section 2(1)(c)(F) precisely to give family businesses maximum flexibility. The proposed rule does the opposite by actually penalizing family businesses that use the best practice of legal incorporation.

The proposed rules for both piece-rate work and the employee count should be re-aligned to plain text and legislative intent. Fixing these rules would relieve small businesses of the unnecessary and costly burdens the proposed rules create. Since the paid sick leave law will already eliminate jobs, especially in rural Oregon, it is critical to do everything possible to reduce further costs for Oregon's small businesses.

Sincerely,



Ted Ferrioli
Senate District 30
Senate Republican Leader



Mike McLane
House District 55
House Republican Leader